

The Supreme Court's 2003 Employment Rulings: Surprising Gains for Workers and Women

By Joanna L. Grossman

The notoriously conservative Supreme Court returned some surprising victories for employees, women, and families during the October, 2003 term.¹ Its most notable employment decision was in *Nevada Department of Human Resources v. Hibbs*,² a case exploring whether the Family and Medical Leave Act, a federal statute mandating unpaid leave for employees who need it because of illness or caregiving responsibilities, protects state government employees.

A second important case, *Desert Palace, Inc. v. Costa*,³ resolved a long-brewing split among federal appellate courts about the proof requirements in so-called “mixed motive” discrimination cases—those in which an adverse employment action (such as a firing, demotion, or failure to hire) occurs for both legitimate and illegitimate reasons.

Both of these cases provide meaningful protection against discrimination for at least some employees. Importantly, they reverse a notable trend towards contracting the federal anti-discrimination rights of employees that had emerged over recent Court terms.

The Hibbs Case

Enacted in 1993, the Family and Medical Leave Act (FMLA) requires employers with at least fifty employees to provide up to twelve weeks of *unpaid* leave for childbirth, new parenting responsibilities, illness, or the need to care for a sick family member.⁴ Because the leave is unpaid, what this means for the employee is that he or she can keep participating in a group health plan (if there is one); has the right not to be retaliated against for taking the leave; and has the right to be reinstated after the leave period.

The question for the Court in *Hibbs* was whether state governments must abide by the FMLA when dealing with their own employees. William Hibbs, the plaintiff in the case, was an employee in the Welfare Division of the Nevada Department of Human Resources, a unit of Nevada’s state government. He sought unpaid leave from his job to care for his ailing wife.

Nevada granted him the leave under FMLA, as well as under a “catastrophic leave” policy, but later fired him anyway. (The parties disputed, among other points, whether the two kinds of leave should be concurrent or consecutive.) Hibbs sued under the FMLA, but Nevada argued for dismissal because of the sovereign immunity provided by the Eleventh Amendment. The trial court agreed with Nevada, but the U.S. Court of Appeals for the Ninth Circuit agreed with Hibbs.⁵ The seven other appellate courts to consider this or a similar issue reached a different conclusion than the Ninth Circuit.⁶

The Supreme Court rejected Nevada’s claim of immunity. The Eleventh Amendment provides states (and state agencies) with immunity from suits for money damages brought in federal court, whether the claims are based on state or federal law. The only exceptions occur if a state voluntarily waives immunity or Congress abrogates that immunity.

To validly abrogate states’ Eleventh Amendment immunity, Congress must first unequivocally express its intent to do so, which it clearly did in the FMLA. The FMLA expressly authorizes suits against any “public agency” in federal or state court, and defines “public agency” to include state governments and their subdivisions.⁷ Second, Congress must act pursuant to a valid exercise of power. This question – on which the appellate courts before *Hibbs*

had divided – is far trickier, and depends on the power under which the legislation is passed. The Court has held, for instance, that Congress does not have the authority to abrogate immunity when it acts pursuant to Article I of the Constitution, but it does have that authority when it acts pursuant to Section 5 of the Fourteenth Amendment.

Section 5 gives Congress the “power to enforce, by appropriate legislation, the provisions” of the Fourteenth Amendment, which guarantees, among other things, the equal protection the laws, and thus has been the source of a number of anti-discrimination statutes.⁸ The Court has said that Section 5 allows Congress to enact statutes prohibiting unconstitutional behavior by the states. And the legislative history of the FMLA contains plain statements that Congress was drawing at least in part on its power under Section 5.

But in this case, the Constitution did not guarantee twelve weeks leave (as the FMLA does), so simply denying that period of leave was not inherently unconstitutional. In addition, it might not be unconstitutional for a workplace to give greater maternity leave than paternity leave, since biological mothers have to recover from childbirth, and fathers, obviously, do not. But the FMLA gives both sexes twelve weeks equally.

The Court has also said, however, that Section 5 empowers Congress to enact statutes that prohibit otherwise *constitutional* behavior – such as, here, denying twelve weeks of leave – to the extent necessary to prevent and deter *unconstitutional* conduct. To do so, however, Congress must both act based on a history of constitutional violations and design a remedy that is both proportional and congruent to the identified injury. Thus the crux of *Hibbs* was whether the FMLA was enacted in response to a history of state-sponsored sex discrimination and, if so, whether it was an appropriate response to that history.

The Court held that because the FMLA was a valid enactment under Section 5, Nevada’s claim of sovereign immunity had to be rejected and Hibbs’ right to sue his employer upheld. Drawing in part on a brief filed by women’s history scholars, the Court found evidence of a long history of state-sponsored discrimination through laws, formal workplace policies, and informal practices. For the better part of the Twentieth Century, states enacted and maintained laws that had the purpose or effect of limiting the rights of working women. Illinois refused to permit women to act as lawyers.⁹ Michigan refused to allow women to tend bar.¹⁰ Oregon limited the number of hours women could do wage-earning work.¹¹ Florida encouraged women to avoid jury service on the theory that it would interfere with their duties as mothers.¹²

Repeatedly, when women tried to seek relief from the U.S. Supreme Court, it turned them away – making the Court’s own recognition of this discrimination all the more significant as an implicit repudiation of past Court mistakes. Even today, Congress found evidence that states continue to rely on outmoded gender stereotypes in the workplace. And these stereotypes are particularly strong with respect to the administration of caregiving and parental leave.

States, the record showed, like private sector employers, tended to utilize policies that created and perpetuated a society in which women are largely responsible for family caretaking either because leave was only available to women or because no leave was available. Either way, they furthered the stereotype of women as primarily responsible for family caregiving needs, parental or otherwise. Denying paternity leave but allowing maternity leave (beyond any actual period of disability associated with childbirth) assumes that men are not interested in child care, and, even if they are interested, gives them no opportunity to act on that interest. The whole burden of caregiving thus falls on women if men do not have access to leave. Meanwhile, offering no leave at all tends to force women to quit in order to become full- or part-time caretakers. In either case, women become less attractive to employers because they are likely to cost more, and stay for less time.

All told, the Court concluded, states committed acts of sex discrimination against female employees based on “pervasive sex-role stereotype that caring for family members is women’s work.”¹³ This evidence was sufficient, in the Court’s opinion, to prove an actual constitutional violation that Congress could validly counteract.¹⁴ Sex discrimination by a state government is an obvious violation of the Equal Protection Clause of the Fourteenth Amendment. (Similar acts by private employers do not violate the Constitution.)

The Court also found that the FMLA directly combats sex discrimination—a necessary component of its Eleventh Amendment analysis. First, since most caretakers are women, it improves the chance that women can continue earning wages despite family responsibilities (as men have always been able to do). Second, it allows men to take leave and share the caregiving responsibilities, rather than leaving them solely to women.

By equalizing leave for both sexes, the Court said, the FMLA “attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving.”¹⁵ In addition, it targets the “fault line between work and family,” where “sex-based generalization has been and remains strongest.”¹⁶ The Court thus ruled for Hibbs and held that the FMLA could constitutionally be applied to the states.

This decision represents an ironic victory from a staunchly anti-federal Supreme Court. It holds promise for sex equality by giving effect to the FMLA’s guarantee of sex-neutral leave for caregiving. In so doing, it should eliminate any disincentive for employers to hire women. In addition, it should encourage fathers to become more involved in caregiving. More broadly, through these measures, the FMLA seeks to promote equality between women and men as workers, and between women and men as parents.

But while this decision is a clear victory, it is a relatively small one, given the practical limitations on its effectiveness. First, the FMLA’s fifty-employee threshold excludes almost half of the American workforce. Second, the FMLA guarantees only unpaid leave, which most workers cannot afford to take. The same workers who cannot afford to hire a caregiver also cannot afford to take unpaid leave: for them, quitting may still seem like the only option. Even for employees who do work for big companies, and can afford to take leave – such as women executives striving to break “glass ceilings”—the FMLA is often no help. The statute permits an employer to deny restoration of a job to its most highly paid employees if it can prove that holding the job open will inflict “substantial and grievous economic injury” on the employer’s operations.¹⁷

Meanwhile, in reality, men, by and large, do not take FMLA leave – or any other type of leave – for purposes of caring for a child or sick family member. And that means the FMLA cannot really fulfill its potential. One theory of the FMLA is that when men and women are both allowed to take equal caretaking leaves, they will be equally likely to be caregivers and thus become equally (un)attractive as employees.¹⁸ But the cultural and financial disincentives to paternal leave-taking are powerful enough to make this ideal fall flat. The numbers are stark—almost no men take leave, even if it is available, and those who do average a leave of four to five days.

The FMLA’s goals are certainly laudable, and this preservation of the statute a positive sign. But greater advances in sex equality will have to come from elsewhere.

The *Desert Palace* case

A second victory for employees came in *Desert Palace, Inc. v. Costa*,¹⁹ in which the Supreme Court resolved a dispute among federal courts of appeals about how to treat “mixed motive” discrimination cases – that is, cases in which an adverse employment action (such as a firing, demotion, or failure to hire) occurs for both legitimate and illegitimate reasons.

The case was brought by Catherina Costa, who was fired from her job as a warehouse worker and heavy equipment operator – the only woman in that job. She sued under Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, color, religion, sex, and national origin. Costa alleged that her firing was an act of sex discrimination. After a physical altercation with a male co-worker, she was fired. He, in contrast, only received a short suspension. Based on this disparity in discipline, other alleged acts of discrimination, and claims of sexual harassment, Costa sued. Her employer, however, points to Costa’s documented history of disciplinary problems and claims the firing was its response to this history; she was a “problem” employee, it argues.

Both Costa and her employer may be telling the truth – Costa’s history on the job, as well as her gender, may have played a role in her firing. Whether the jury should get to decide this case, and, how they should be instructed, turns on the proper understanding of mixed-motive discrimination, a complicated issue relating to burdens of proof.

In 1973, in *McDonnell Douglas Corp. v. Green*,²⁰ the Supreme Court made clear how burdens of proof and production work in a discrimination case. (A “burden of proof” is the standard for how persuasive the proof of a claim must be. In contrast, a “burden of production” is not a burden to persuade; rather, it is a burden to come forward with at least some evidence.)

First, the plaintiff must make out a “prima facie” case, proving some very basic facts necessary to support an inference of discrimination. For instance, suppose – as a hypothetical – that a woman says she was not hired for

a particular job due to sex discrimination. To make out her prima facie case, she must prove that she belongs to a protected class; was qualified for, and applied for, the job; and that she was rejected. She also must prove either that a man was hired for the job, or that the employer continued to seek other applicants after rejecting her.

The employer then has a burden of production. It must articulate a legitimate, non-discriminatory reason for the challenged employment action. For instance, in our hypothetical woman's case, it might say that its interviewer was unimpressed with her educational background. It does not, however, have to persuade anyone of this reason.

Finally, the plaintiff has the opportunity to disprove the employer's articulated reason. For instance, she might show that the company hired men with very similar educational backgrounds. Alternatively, she can offer other evidence to show that the offered reason is a pretext for discrimination. She might also show the jury the interviewer's notes on her, and point out a little doodle of her in a short skirt under the heading "personality." At the end of the case, the jury is instructed that it *may* find for the plaintiff if she has either disproved the employer's articulated reason *or* offered other evidence that the reason given is pretextual. The plaintiff retains the burden of proof, but the jury is instructed that acceptable proof to satisfy that burden can take one of several forms.

This proof structure is useful in the typical employment discrimination case in which there is no "smoking gun." (After all, most people who discriminate do not announce, or leave evidence, that they are doing so.) The *McDonnell Douglas* model gets around that problem by forcing the employer to explain its actions. In this way, it narrows the litigation so it revolves around an actual reason offered by the employer, rather than forcing the plaintiff to disprove all conceivable, legitimate justifications for the employment action. It also gives the plaintiff a chance to take issue with a decisionmaking process to which she might otherwise have little, if any, access.

The *McDonnell Douglas* model, useful as it is, has limits – and a mixed-motive case soon arose to test them. The case, *Price Waterhouse v. Hopkins*,²¹ led to a 1989 Supreme Court decision that significantly altered Title VII litigation.

In *Price Waterhouse*, a firm denied partnership to a female candidate. There was some evidence that the decision was made both on the basis of her sex (an obviously illegitimate motive) and on the basis of her behavior at work (a legitimate motive). This is where *McDonnell Douglas* breaks down. The employer would satisfy its burden of production, coming forth with its legitimate reason for not making Hopkins partner: her behavior. Then the burden would be on Hopkins to disprove that reason, or show it was a pretext. If she couldn't, she would lose – even if she could show that there were other, illegitimate reasons for the denial.

In sum, then, it seemed under *McDonnell Douglas* that Hopkins might lose even if the firm took her gender into account when making an employment decision—a clear Title VII violation. Unless the Court took action, Hopkins would thus have a right – the right not to be discriminated against – but no remedy for its violation. And her employer would be given a free pass despite having committed a proven act of discrimination.

That anomaly inspired the Supreme Court, in *Price Waterhouse*, to devise an alternative proof structure for mixed-motive cases. The proof structure the Court set forth in *Price Waterhouse* is not current law, however. Rather, it was superseded by Congress's amendments to Title VII in the Civil Rights Act of 1991. Those amendments made clear that discrimination with mixed motives is still discrimination: it occurs whenever a prohibited characteristic was "a motivating factor for any employment practice, even though other factors also motivated the practice."²²

The amendments also made clear that in the event an employer can show that it would have taken the same action without the discriminatory motive, the plaintiff cannot collect damages. But the employer is not completely off the hook. If that defense is proven, the plaintiff can still hold the defendant liable and obtain injunctive relief and attorneys' fees, both potentially valuable remedies.

As noted above, the 1991 amendments largely superseded *Price Waterhouse*. Yet one aspect of the decision remained relevant even after 1991. This is the issue that, last week, *Desert Palace* finally resolved. The Court's *Price Waterhouse* decision had been splintered, with the main opinion garnering only a plurality of four, not a majority of five. (Justices White and O'Connor each concurred in the judgment, but did not completely agree with the plurality's reasoning.)

Justice O'Connor wrote that the burden should not shift to the employer unless and until the plaintiff could "show by *direct evidence* that an illegitimate criterion was a substantial factor in the decision."²³ Justice O'Connor's was the only opinion to mention the "direct evidence" requirement, which led to a variety of ambiguities. First, was the mention of "direct evidence" in her concurrence sufficient to make it part of the holding? Had the other Justices agreed with her, or did standard rules of vote counting make it the "narrowest ground" and therefore the holding? Second, had the 1991 amendments—which neither adopted nor rejected the "direct evidence" requirement—rendered her concurrence, if it had been binding on lower courts, irrelevant?

To add even more confusion, courts also disagreed as to what "direct evidence" meant. Literally, "direct evidence" means evidence that is sufficient to prove a fact without any inferences having to be drawn. In contrast, "circumstantial evidence" gives the fact-finder related facts from which it might conclude the existence of a particular, central fact. The testimony of a witness who saw a suspect commit murder is direct evidence. Evidence that a hair from the suspect's head was found in the victim's apartment near the body is circumstantial evidence from which a jury may draw an inference of guilt.

In a murder case, that's relatively straightforward. But what about a discrimination case? A few courts took "direct evidence" literally, dismissing the claims of plaintiffs who couldn't come up with evidence of a virtual confession (written or oral) by their employer. Other courts, instead, said "direct evidence" of discrimination might simply be evidence showing animosity towards the protected class (for instance, women). In contrast, "indirect" evidence would show only that the employer's proffered reason was false. In both cases, a jury would need to draw inferences to decide the ultimate fact: whether the act was motivated by an illicit consideration of a protected characteristic. Some courts also said that the evidence, whether technically direct or circumstantial, needed to bear directly on *the decisionmaking context in particular* – it needed to be direct in the sense that it was immediate. Thus, if a boss said at a company picnic that women should be barefoot and pregnant in the kitchen, but did not jot down those thoughts in his interview notes, he might be off the hook for later failing to hire a pregnant woman.

In *Desert Palace*, the Supreme Court achieved a simple, neat resolution of the "direct evidence" issue. It approved a jury instruction, in a mixed-motive case, that did not even mention the nature of the evidence plaintiffs must offer to carry their burden. Its reasoning was simple, too. The 1991 amendments had codified their own proof structure – one substantially different from that of *Price Waterhouse*. The amendments never mentioned any "direct evidence" requirement. Nor did the original statute. Therefore, there was no such requirement in the law.

Justice Thomas – a former EEOC head with experience interpreting Title VII and a conservative justice with a penchant for narrowly interpreting statutes – wrote the opinion. He reasoned that the amended statute plainly says that a plaintiff "need only 'demonstrate' that an employer used a forbidden consideration with respect to 'any employment practice.'" It also goes on to define "demonstrate" to mean "meet[ing] the burdens of production and persuasion." Nowhere, he pointed out, does it impose a requirement that direct evidence be offered to prove the "forbidden consideration."²⁴

The Court's decision in this case opens doors for more plaintiffs to get their cases to a jury. After *Desert Palace*, a plaintiff who has faced mixed-motive discrimination, and who can offer some proof of animus or hostility to his or her group status, may be able to win—or at least get before the jury. Prior to *Desert Palace*, in contrast, many courts would have required that proof not only be convincing, but also "direct" in order for a plaintiff's claim to survive summary judgment.

The change is obviously a good one: if a plaintiff can persuade a jury that there was discrimination, she should not also have to rely on a special kind of evidence to do so. Prior lower court cases on this issue – now overruled – unfairly hamstrung plaintiffs as to what kind of evidence they could present. These decisions required "smoking guns" even at a time when, as employers become more and more wary of litigation, such evidence is less and less likely to appear. Any modern employer who fails to put together employment files with an eye toward possible litigation is foolish.

Unfortunately, however, much discrimination in the workplace continues. For instance, Costa's isolation as the only woman doing her job should itself be troubling, though it was not directly at issue in her case. Doubtless, it affected her working conditions. Why, nearly four decades after Title VII was enacted, was Catherina Costa—a *female* heavy equipment operator—such an anomaly?

One answer is that Title VII has been ineffective in addressing occupational segregation—the channeling of men and women into separate careers and jobs. That is doubly a problem: not only is such segregation itself a system of discrimination, it is also closely linked to higher levels of sexual harassment and other forms of discrimination. Ending sexual segregation in employment would be a true victory.

Conclusion

The Supreme Court's decisions in *Hibbs* and *Desert Palace* were a welcome surprise, but by no means a panacea for all that ails women and other employees likely to face discrimination in the workplace. Significant problems of discrimination remain unresolved. But further progress may be made next term, with the Court's having already agreed to hear three employment law cases when it reconvenes in October.

Those pending cases will address whether the Age Discrimination in Employment Act prohibits “reverse discrimination” (discrimination against younger employees in favor of older ones),²⁵ whether an employer can refuse to hire a recovered drug addict under the Americans with Disabilities Act,²⁶ and, finally, what the appropriate statute limitations is for race discrimination claims brought under Section 1981.²⁷

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NOTES

¹ In addition to the cases discussed here, the Court decided two other employment law cases. See *Clackamas Gastroenterology Ass'n v. Wells*, 123 S. Ct. 1673 (2003) (holding that the employer's level of control over the individual is the touchstone for determining whether a physician-shareholder is an employee for purposes of the Americans with Disabilities Act); *Breuer v. Jim's Concrete of Brevard, Inc.*, 123 S. Ct. 1882 (2003) (allowing an employer to remove the case to federal court under 28 U.S.C. § 1441(a) when an employee files a claim under the Fair Labor Standards Act in state court).

² 123 S. Ct. 1972 (2003).

³ 123 S. Ct. 2148 (2003).

⁴ Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.* (2000).

⁵ 273 F.3d 844 (2001).

⁶ See *Laro v. New Hampshire*, 259 F.3d 1, 11 (1st Cir. 2000); *Townsel v. Missouri*, 233 F.3d 1094, 1096 (8th Cir. 2000); *Chittister v. Dep't of Cmty. & Econ. Dev.*, 226 F.3d 223, 229 (3d Cir. 2000); *Kazmier v. Widmann*, 225 F.3d 519, 526, 529 (5th Cir. 2000); *Sims v. Univ. of Cincinnati*, 219 F.3d 559, 566 (6th Cir. 2000); *Hale v. Mann*, 219 F.3d 61, 69 (2d Cir. 2000); *Garrett v. Univ. of Ala.*, 193 F.3d 1214, 1220 (11th Cir. 1999), *rev'd on other grounds*, 531 U.S. 356 (2001).

⁷ See 29 U.S.C. § 2617(a)(2) (2000); 29 U.S.C. § 203(x) (2000).

⁸ U.S. CONST. amend. XIV, § 5.

⁹ *Bradwell v. Illinois*, 83 U.S. 130 (1872).

¹⁰ *Goesaert v. Cleary*, 335 U.S. 464 (1948).

¹¹ *Muller v. Oregon*, 208 U.S. 412 (1908).

¹² *Hoyt v. Florida*, 368 U.S. 57 (1961).

¹³ *Hibbs*, 123 S. Ct. at 1979.

¹⁴ *Id.* at 1982.

¹⁵ *Id.* at 1982-83.

¹⁶ *Id.* at 1975.

¹⁷ See 29 U.S.C. § 2614(b) (2000).

¹⁸ Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707 (2002).

¹⁹ 123 S. Ct. 2148 (2003).

²⁰ 93 S. Ct. 1817 (1973).

²¹ 490 U.S. 228 (1989).

²² 42 U.S.C. § 2000e-2(m) (2000).

²³ *Hopkins*, 109 S. Ct. at 1804 (O'Connor, J., concurring).

²⁴ *Costa*, 123 S. Ct. at 2153-54.

²⁵ See *Cline v. Gen. Dynamics Land Sys., Inc.*, 296 F.3d 466 (6th Cir. 2002) (holding that employees between ages 40-49 had a cause of action to challenge employer's agreement to provide full health benefits only to employees 50 years old and older).

²⁶ See *Hernandez v. Hughes Missile Sys. Co.*, 292 F.3d 1038 (9th Cir. 2002) (holding that employer's refusal to rehire a recovered addict, pursuant to an unwritten policy of refusing to rehire former employees who quit in lieu of being discharged, violates the Americans with Disabilities Act).

²⁷ See *Jones v. R.R. Donnelley Sons Co.*, 305 F.3d 717 (7th Cir. 2002) (refusing to apply state's four-year catch-all statute of limitations to race discrimination claim brought under 42 U.S.C. 1981).